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No. 04-905

IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.,
Petitioner,

v.

Reeder-Simco GMC, Inc.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE TRUCK MANUFACTURERS ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE FARM EQUIPMENT MANUFACTURERS ASSOCIATION, THE ASSOCIATION OF EQUIPMENT MANUFACTURERS, AND THE BUSINESS AND INSTITUTIONAL FURNITURE MANUFACTURER'S ASSOCIATION INTERNATIONAL AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.2 of the Rules of this Court, the Truck Manufacturers Association ("TMA"), the National Association of Manufacturers ("NAM"), the Farm Equipment Manufacturers Association ("FEMA"), the Association of Equipment Manufacturers ("AEM"), and the Business and Institutional Furniture Manufacturer's Association International ("BIFMA") respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief. Its letter of consent has been lodged with the Clerk of Courts. Respondent has declined to consent.

TMA is a not-for-profit corporation whose members include all of the major North American manufacturers of medium-duty and heavy-duty trucks (greater than 19,500 pounds gross vehicle weight rating). TMA's members include Ford Motor Company, Freightliner LLC, General Motors Corporation, International Truck and Engine Corporation, Isuzu Motors America, Inc., Mack Trucks, Inc., PACCAR Inc., and Petitioner, Volvo Trucks North America, Inc.

NAM is the United States' largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

FEMA is a not-for-profit corporation comprised of over 650 United States and Canadian companies that are engaged in the manufacture and sale of specialty farm equipment, as well as companies that supply those manufacturers. FEMA operates to enhance the specialty farm equipment manufacturing industry by, among other things, providing industry leadership and business opportunities to its members.

AEM is a nonprofit corporation. Its members include the major manufacturers of equipment used worldwide in the construction, agricultural, mining, forestry, and utility industries. AEM members produce a wide variety of equipment, from large earthmovers and agricultural equipment to smaller hand-held, portable and walk-behind machinery designed to handle a wide variety of specialized tasks. Its members also produce components used by these equipment manufacturers, such as engines, transmissions, hydraulic equipment, and electronic controls; as well as provide services to these dynamic industries.

BIFMA is a not-for-profit trade association of furniture manufacturers and suppliers. BIFMA has 260 members, 145 of which are office furniture manufacturers. BIFMA's mission is to serve the North American office, business and institutional furniture manufacturing industry by providing industry information, advocating for the industry's interests, and offering industry-wide trade development opportunities.

Amici seek leave to file an amicus brief because the Eighth Circuit's erroneous application of the Robinson-Patman Act threatens to constrain their members from providing discounts or competitive price allowances to independent resellers. These discounts are the principal means by which manufacturers in many markets (including those for medium-duty and heavy-duty trucks, farm equipment, construction equipment, office furniture, and numerous other products sold by *amici*'s members) compete for sales to retail customers and the means by which retail customers secure favorable pricing, *i.e.*, by playing off one manufacturer's reseller against another manufacturer's reseller. Neither the Act's text nor its purposes justify the Eighth Circuit's novel application of it in these circumstances, and its decision conflicts with the decisions of this Court, as well as the decisions of other courts of appeals. Moreover, the effect of the Eighth Circuit's misapplication of the Act will be to decrease interbrand competition and to increase prices to consumers in the markets in which *amici*'s members participate.

For these reasons, TMA, NAM, FEMA, AEM, and BIFMA respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The individual interests of *amici curiae* are stated in the motion accompanying this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, *amici* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

Amici collectively are interested in this case because the Eighth Circuit's decision threatens to impede substantially their members' ability to engage in interbrand competition by offering price discounts to their resellers. The Eighth Circuit, in a decision that conflicts with decisions of other courts of appeals on important issues of Robinson-Patman Act ("RPA") interpretation, concluded that manufacturer discounts may violate the RPA even when given to resellers that are competing only against resellers of other brands.

In reaching that conclusion, the Eighth Circuit misapplied the Act in a manner that will hinder competition and raise prices to consumers in the truck market involved in this case, as well as in markets for many other types of products sold by *amici*'s members. As explained in the sections that follow, while manufacturers employ the type of discounts at issue to increase *inter*brand competition, those discounts do not lessen *intra*brand competition—and the lessening of such competition is a required element of a RPA claim based on a manufacturer's prices to its resellers.

1. The market for medium-duty and heavy-duty trucks. Unlike automobiles, medium-duty and heavy-duty trucks are rarely bought "off the lot." Most trucking company purchasers operate fleets (varying from only a few trucks to several thousand trucks). These fleets serve a variety of uses, including over-the-road cargo hauling, and vocational applications, such as construction or logging. By the late 1990s, large purchasers (more than 100 trucks per year) comprised about a third of the market; midsized buyers (who purchased ten to ninety-nine trucks a year) just under a quarter, and only the remainder was comprised of small purchasers (who purchased less than ten a year).[2]

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[2] Michael E. Porter and Örjan Sölvell, *Volvo Trucks (A): Penetrating the U.S. Market*, Harv. Bus. Sch. Pub. (Rev. March 31, 2004) (*available at* http://www.hbsp.harvard.edu/b02/en/common/item_detail.jhtml?id=702418).

Truck manufacturers aggressively market their products by, among other things, providing their dealers with additional discounts on multiple truck deals to win business away from other manufacturers. Because the manufacturers have comparable product offerings, often the main competitive battle is over price. The result of this competitive battle is that customers obtain lower prices.

Because of the diversity of jobs for which these trucks are used, manufacturers offer a myriad of options for, among other things, engines, transmissions, axles, and cab configuration. Buyers generally purchase trucks "made to order" from dealers who most often maintain close relationships with their customers.[3] Because competition among truck manufacturers is fierce, truck buyers typically approach dealers of multiple brands before making a purchase. The prospective purchasers provide their specifications to the dealers and select the dealer (and its manufacturer) that gives the best terms. The manufacturer then builds its truck "from the ground up."

Since there are numerous options and specifications, manufacturers set the price they will sell trucks to their dealers case by case. For each prospective purchase, the dealer works with the potential buyer and finds out as much information as possible about its needs and circumstances—learning the buyer's specifications, how many trucks it desires, what other brands the buyer is considering, and, when possible, the prices offered by the competitor. Is the buyer, for example, a Volvo owner who might be more inclined to stay with that brand? Is the buyer seriously considering other brands? How price sensitive is the buyer? Is the buyer a "conquest account," meaning a buyer who has historically purchased another brand?—if so, a manufacturer may be willing to grant a significantly increased discount.

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[3] *Id.*

The dealer passes this information on to the manufacturer, which then considers a host of factors to determine whether and how much of an additional discount off the dealer's standard discount the manufacturer will provide in the hope of gaining the business. Some of these factors are industry related, *e.g.*, what is the current demand for trucks? Some are manufacturer related, *e.g.*, how busy is the assembly plant? And some are specific to the particular customer, *e.g.*, how many trucks is the customer expected to buy both now and in the future? Does the customer currently use a competing manufacturer's trucks or does he use the manufacturer's trucks but is considering another brand? Considering all of these factors—some of which are more amenable to calculation than others—the manufacturer provides the dealer with an additional discount, variously referred to as a "competitive price allowance" or a "concession." The result of this process is that on multiple truck deals to which price assistance programs apply, "dealers never know how much to sell a truck for until they call factory officials to see how much extra concession they'll allow on the deal."[4]

As Volvo demonstrated at trial, this system does not disadvantage its dealers competing for a particular sale because Volvo has a policy of providing the same discount to dealers that are working with the same potential buyer. C.A. 1162. That policy is common in the industry. *See Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 323 (5th Cir. 1998) (competitive price assistance program managed "to ensure that all Ford dealers bidding the same customer received an equal [competitive price allowance]"). It allows manufacturers to ensure that all of their dealers are able to compete with other brands without favoring some of their dealers over others in making a sale. *See id.* (providing dealers on the same bid with the same discount ensured "that all

[4] Joseph Bohn, *Truck Dealers Assail Floating-Discount Price System,* Automotive News, April 22, 1991, at 22.

Ford dealers could meet the competition from other original equipment manufacturers").

Thus, a manufacturer's price discount policy has no effect on whether a purchaser decides to buy from any particular dealer of that brand. Instead, the discounts serve only to *reduce* prices of one brand in competition with other brands. They promote *inter*brand price competition—the very type of competition that the antitrust laws principally protect. *See Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

2. Manufacturers in other markets also use differential prices to noncompeting resellers to foster interbrand competition. Similar procompetitive differential pricing occurs in many of the other markets in which *amici*'s members participate. Office furniture manufacturers, for example, market their products in a manner very similar to truck manufacturers, using independent resellers that sell to customers through a competitive bidding process that yields unique sales contracts. Agricultural and construction equipment manufacturers also generally market their products through a network of authorized dealers. These dealers in turn sell to construction companies, equipment rental firms, agricultural companies, government agencies, mining companies, and other end users. Interbrand competition among manufacturers of similar equipment types is intense. As in the truck market, equipment buyers typically approach dealers of several brands to negotiate the best bid for a unit or for an entire fleet that meets the end user's specifications. Given the general competitive environment or internal factors, such as a manufacturer's marketing objectives, a manufacturer may decide to offer additional price assistance to its dealer (*e.g.*, a greater discount or favorable financing) in order to obtain that buyer's business.

In fact, countless times every day members of the *amici* and other United States manufacturers grant additional discounts to independent resellers in order to secure a customer's order in the face of fierce interbrand competition. Through the use of such discounts—one weapon in the rough and tumble competitive battle—customer brand allegiance is switched and new products and product systems are purchased. The ultimate winner in this battle is the customer, who, having played one manufacturer off against another, is able to secure a lower price.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision, in addition to construing the RPA in a manner that conflicts with decisions of this Court and of other courts of appeals, fails to recognize the economic realities of the world in which manufacturing companies compete. The type of price competition that the Eighth Circuit held illegal, *i.e.*, discounts given to independent resellers to obtain a specific consumer's order, are prevalent in numerous industries, are procompetitive, and are consistent with decades of RPA jurisprudence. Indeed, this Court and other courts of appeals have recognized that the RPA does not forbid a manufacturer from offering its resellers differential prices if those resellers are not in actual competition for the same customers.

The Eighth Circuit ignored this basic principle. It instead allowed Respondent to recover based on allegations that Petitioner gave other resellers lower prices in connection with sales that Respondent could not have made because it was not competing for those sales. If the Eighth Circuit's decision stands, a manufacturer that offers a lower price to one of its resellers risks an RPA violation unless it offers the same price to all its resellers—even those that do not compete with that reseller or that could not have sold to that customer. Because of this risk, most manufacturers will need to reexamine their existing pricing programs and many will have to change those programs—an undertaking that will certainly impose substantial and unnecessary transaction costs and that will likely yield higher prices. The conflict created by the Eighth Circuit's opinion thus presents an issue of national importance that warrants this Court's proper resolution.

ARGUMENT

I. THE EIGHTH CIRCUIT'S ROBINSON-PATMAN ACT INTERPRETATION IS OF SUBSTANTIAL IMPORTANCE BECAUSE IT THREATENS TO IMPAIR PRICE COMPETITION WHEN MANUFACTURERS SELL THROUGH INDEPENDENT RESELLERS.

The Eighth Circuit's reliance on Volvo's discounts to dealers that were not attempting to sell to the same potential buyers as Respondent will likely result in less vigorous interbrand competition and higher prices—both in markets where goods are sold to individual customers through competitive bidding and in other markets in which resellers of the same brand do not compete for the same customers.

Under the Eighth Circuit's reasoning, a manufacturer setting the price on any one deal may not safely limit its price concession to the competitive circumstances of that sale. Instead, the manufacturer must consider the discounts it made up to months earlier on sales through other dealers to other customers anywhere in the United States (the breadth of the RPA). For example, if a manufacturer elected for competitive reasons to give a discount in connection with a particular bid situation in North Dakota, the Eighth Circuit's decision would arguably require that the manufacturer give that same discount on all similar trucks sold anywhere in the United States, even if the manufacturer extended the lower price in North Dakota to fill its order board, capture a high profile fleet, win business away from the manufacturer's competitor, or protect existing business from being won away by a low-balling competitor.

Under the decision, a manufacturer's only safe course of action to avoid RPA claims like those made by Respondent would be to level all discounts with a higher price. When it might otherwise be willing to discount heavily in one instance to try to win business from a rival or keep a factory at profitable usage, a manufacturer must now consider whether it can afford to offer that same discount to dealers elsewhere in the country for several months in the future. Unless a manufacturer is prepared to give the same discount to all its dealers, it likely will not give the discount at all.

The United States Department of Justice, in the analogous circumstance of most-favored-nations clauses, has concluded that this type of situation is *anti*-competitive.[5] It has reasoned that when a seller is forced to make a lower price available to other customers, price-cutting will be discouraged. So too under the Eighth Circuit's decision: manufacturers will be less willing to offer an aggressive discount on a particular deal if they are forced to provide that discount on all future deals, regardless of differing competitive circumstances.

These detrimental effects, moreover, are likely to be far reaching. Counseling—rather than prosecution—is the primary driver of RPA enforcement: "[T]ens of thousands, probably hundreds of thousands, of pricing decisions every

[5] *See, e.g., United States v. Med. Mut.*, 1999-1 Trade Cas. (CCH) ¶ 72,465 (N.D. Ohio Jan. 29, 1999) (consent decree barring enforcement of most-favored-nation requirement); *United States v. Delta Dental*, 1997-2 Trade Cas. (CCH) ¶ 71,860 (D.R.I. July 2, 1997) (consent decree prohibiting enforcement of most-favored-nation clause); *United States v. Ore. Dental Serv.*, 1995-2 Trade Cas. (CCH) ¶ 71,062 (N.D. Cal. July 14, 1995) (consent decree challenging most-favored-nation clause that discouraged discounts); *United States v. Lykes Bros. S.S. Co.*, 60 Fed. Reg. 52,208 (DOJ Oct. 5, 1995) (consent decree barring enforcement of "automatic rate differential clause"). *See also* Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 Antitrust L.J. 517, 529-30 (1996).

year are altered through fear of Robinson-Patman." Robert H. Bork, THE ANTITRUST PARADOX, 384 (1978). Thus, although the Eighth Circuit's extension of the RPA's prohibition on discounts cannot be reconciled with the Act's text or purpose and is inconsistent with the decisions of other courts (as explained *infra*), manufacturers may opt to adhere to it for national pricing strategies, rather than risk costly litigation. Indeed, the Act's treble damage and attorneys' fees provisions are substantial deterrents to testing in litigation the reach of the Eighth Circuit's decision. The potential competitive advantage obtained by giving increased discounts on particular bids will likely not warrant exposure to multimillion-dollar judgments like the one affirmed below. As a result, this Court may not be presented with another opportunity to correct the Eighth Circuit's error until long after manufacturers' efforts to comply with the decision substantially and needlessly diminish competitive market processes and increase prices to consumers.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS INTERPRETING THE ROBINSON-PATMAN ACT'S COMPETITIVE INJURY REQUIREMENT.

Section 2(a) of the RPA, 15 U.S.C. § 13(a), does not require a manufacturer to offer identical prices for its products to each dealer on every occasion. *See Am. Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963). Section 2(a) prohibits a manufacturer from charging different prices to its dealers only when the effect of the price differences "may be *substantially to lessen competition* . . . or prevent competition *with any person who either grants or knowingly receives the benefit of such discrimination*, or with customers of either of them." 15 U.S.C. § 13(a) (emphasis added). Thus, a § 2(a) claim requires a substantial lessening of competition at either the level of the person granting the discriminatory price (*i.e.*, the "primary line") or at the level of the person receiving the discriminatory price (*i.e.*, the "secondary line").

The RPA's prohibition on secondary line price discrimination was intended to remedy the perceived injustice that large chain retail stores would use their buying power to extract favorable discounts from manufacturers and would then lower their prices in order to drive their smaller rivals out of business by either stealing customers outright or by forcing the small stores to make unprofitable reductions in their own prices. *See FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948).

In a secondary line claim, like the one at issue, the relevant competition is competition *among that manufacturer's resellers.* A secondary line § 2(a) violation requires that the disfavored reseller compete with the favored reseller for the same retail customers and lose business or profits because of the price discrimination. *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 580 (5th Cir. 1982) (§ 2(a) requires proof that "the likely effect of the alleged price discrimination was to allow a favored competitor to draw significant sales or profits away from him, the disfavored competitor"). Thus, the plaintiff must prove that it competed with the favored purchaser at the time of the purchases. *See, e.g., Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1170-71 (7th Cir. 1978) ("Plaintiff must show that he competes with those customers receiving the favored prices.").

This requirement—that the disfavored reseller loses sales or profits to favored resellers—was effectively eliminated by the Eighth Circuit's conclusion that Petitioner's sales to dealers not competing against Respondent for the same customers violated the Act. By permitting Respondent to recover merely by showing that another dealer received a better price at some other time, in some other place, and in connection with sales to some other customer, the court of appeals has rewritten the RPA to prohibit manufacturers from lowering their price to compete against other brands, unless they give all resellers—even resellers that do not compete for the same customers—the same price.

A. Section 2(a) Requires Proof that the Price Differential Impedes the Disfavored Reseller's Ability to Sell to the Same Customers as the Favored Reseller.

A disfavored reseller can prove a "competitive injury" either directly or indirectly. *See Morton Salt,* 334 U.S. at 49. In either event, however, the injury itself must be of a type to which the RPA applies—*i.e.*, in a secondary line case, it must be lost sales or profits *caused by* the manufacturer charging different prices to competing resellers. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); *see also Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 421 (8th Cir. 1986) (no nexus demonstrated between the discriminatory price and plaintiff's injury when plaintiff presented no evidence that it "actually lost sales to [a] competing Texaco station" or that it "lowered its prices and decreased its profits in order to compete with any lower price by a Texaco dealer"); *Ag-Chem. Equip. Co. v. Hahn, Inc.*, 480 F.2d 482, 491 (8th Cir. 1973) (§ 2(a) verdict could not stand where "favored" dealer sold to "customers which were completely unavailable to plaintiff").

The direct method of proving competitive injury requires either (i) evidence that customers chose to buy from the favored reseller because its prices were lower as a result of the discriminatory discount, or (ii) proof that in order to avoid losing sales to the favored reseller, the disfavored reseller lowered its prices to meet the favored reseller's price and thereby lost profits. *See J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990); *see also Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 385-86 (8th Cir. 1987).

The indirect method of proving competitive injury requires evidence that for a significant amount of time the manufacturer sold goods to the disfavored reseller for substantially more than it sold the same goods to other resellers that were in direct competition for the same sales. *See Mor-*

ton Salt, 334 U.S. at 50. This indirect method thus proves the same competitive harm as the direct method: the disfavored reseller lost sales or profits because the discriminatory discount enabled a favored reseller to "steal" customers or forced the disfavored reseller to lower prices unprofitably to meet the favored reseller's prices. It is because the indirect method is intended to prove losses caused by the price discrimination that this Court has instructed, "[i]n the absence of direct evidence of displaced sales, this inference [of competitive injury] may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *Falls City Indus.*, 460 U.S. at 435.

B. The Eighth Circuit's Conclusion that Respondent Can Prevail in the Absence of Evidence that it Lost Sales to Competing Volvo Dealers Conflicts with Decisions of Other Courts of Appeals.

Because a § 2(a) secondary line claim only arises when a manufacturer's price differences disadvantage one reseller in competing for customers with other resellers of that brand, other courts of appeals have held that the RPA does not apply in circumstances, like those here, in which a disfavored purchaser did not try to compete for the same sales as the favored purchaser. For example, in *M.C. Manufacturing Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), the Fifth Circuit reversed a jury verdict that M.C. Manufacturing's supplier violated the RPA by giving one of M.C. Manufacturing's competitors, H/R, a better deal on a component part for military hardware. The Fifth Circuit held that M.C. Manufacturing's RPA claim failed as matter of law because M.C. Manufacturing and H/R could not have been in competition—M.C. Manufacturing and H/R had both obtained an exclusive contract to sell the finished product to the government during different years. Since M.C. Manufacturing was selling under a preexisting fixed-price contract, discrimination in price by its supplier could not have created the lessening of competition essential to a RPA claim: "while the price discrepancy between the two actual purchases . . . could have affected [M.C. Manufacturing's] profits under the addition to its 1970 contract, this discrimination in no way diminished [its] competitive ability in that plug market." *Id.* at 1067. *See also Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 692 (5th Cir. 2003), *cert. denied,* 124 S. Ct. 2881 (2004) ("plaintiff must first prove that as the disfavored purchaser, it was engaged in actual competition with the favored purchaser(s) as of the time of the price differential" (internal quotation marks omitted)).[6]

Similarly, in *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, the Second Circuit reversed a jury verdict on a secondary line RPA claim where, like here, the plaintiff failed to show actual competition with the favored purchasers. 842 F.2d 578, 585-86 (2d Cir. 1987). In *Best Brands*, the Second Circuit held that the plaintiff, a brewery wholesaler with an exclusive territory, failed to demonstrate any competitive injury caused by the greater discounts its supplier gave competing wholesalers. Although the plaintiff suggested that the other wholesalers could ship into its territory, it did not present evidence that the favored wholesalers *in fact* took advantage of a price difference to make sales that the plaintiff otherwise could have made. *Id.* at 586.

Based on these authorities and the RPA's text and purposes, commentators have generally presumed that "competitive bidding is not subject to the price discrimination proscriptions of the Robinson-Patman Act, since it generally does not result in competitive injury." Neal R. Stoll, *The Paradox of Value: Price Discrimination Under Section 2(a) of the Robinson-Patman Act*, 740 PLI/Corp 169, at 206

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[6] *See also Olympia Co. v. Celotex Corp.*, 597 F. Supp. 285, 297 (E.D. La. 1984) (previous competition irrelevant if purchasers were not competitors at the time of the purchases), *aff'd on other grounds*, 771 F.2d 888 (5th Cir. 1985).

(1991).[7] The Eighth Circuit's decision casts that presumption—and the millions of daily pricing decisions that are made based on it—into substantial doubt.

C. The Eighth Circuit's Decision Creates Substantial Uncertainty Regarding the Robinson-Patman Act's Application When Manufacturers Provide Discounts to Noncompeting Resellers.

By holding that Petitioner's price discounts relating to sales that the Respondent *could not have made, and indeed, did not ever try to make,* caused harm to competition, the Eighth Circuit's decision erroneously extends the RPA to situations in which only one of a particular manufacturer's resellers is competing for a particular sale. As explained above, the decision thus conflicts with decisions of other federal courts, including the Fifth and Second Circuits. Because this conflict creates substantial uncertainty regarding whether manufacturers may give differential discounts to noncompeting resellers and harms interbrand competition, this Court should grant certiorari and reverse.

1. Reeder's § 2(a) claim is not supported by direct evidence: Greater discounts to other dealers in other transactions cannot show competitive harm.

The evidence on which the Eighth Circuit principally relied cannot support Reeder's contention that Volvo's differ-

[7] Competitive bidding is also not properly within the purview of § 2(a) because, as Petitioner explains (*see* Pet. at 12-15), such bidding does not meet § 2(a)'s two-sale requirement. *See also Cool Insulations, Inc. v. Owens-Corning Fiberglass Corp.*, 1999-1 Trade Cas. (CCH) ¶ 72,486 (W.D. Tex. 1998) (adopting *M.C. Mfg. Co.* view that competitive bidders are not "competing purchasers"); *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285, 287-89 (E.D. Pa. 1976) (competitive bids are outside §2(a)), *aff'd*, 565 F.2d 151 (3d Cir. 1977) (unpublished table decision).

ent discounts lessened competition—*i.e.*, impaired Reeder's ability to sell trucks against other Volvo dealers. Indeed, Reeder's sole witness testified that it rarely competed with other Volvo dealers (C.A. 1489-90); its competition admittedly came from other truck manufacturers' dealers (*id.* at 1489).

Sales lost to other manufacturer's dealers are not evidence of competitive harm. The Eighth Circuit's decision affirms the § 2(a) award principally based on Reeder's contention that but for the alleged violation, Volvo would have charged it less for trucks, and Reeder would have then successfully sold to more customers (at the expense of dealers of competing truck manufacturers) and would have had bigger profit margins on those sales. *See* App. 15a-17a. But the "violation-free" state of affairs is not one in which all dealers get the challenged discounts. *See Rose Confections*, 816 F.2d at 394-95. As discussed above, manufacturers put to the choice of lowering all prices or none will likely choose to forgo discounting. More fundamentally, the lost business on which Reeder relied results from *inter*brand competition—it has nothing to do with harm to competition under § 2 (a). *See Universal-Rundle Corp. v. FTC*, 382 F.2d 285, 287 (7th Cir. 1967); *Nat'l Distillers & Chem. Corp. v. Brad's Mach. Prods., Inc.*, 666 F.2d 492, 496 (11th Cir. 1982). In particular, Reeder's decreased profits from sales lost to other manufacturers' products cannot, as a matter of law, establish injury to competition. That Volvo gave other dealers larger discounts on other deals that Reeder was either unaware or uninterested in pursuing cannot prove competitive injury. *Cf. M.C. Mfg. Co.*, 517 F.2d at 1067 (error not to grant defendant directed verdict on § 2(a) claim when evidence showed that plaintiff's purchasers were for a different contract than other dealers because "[e]ach contract represented a separate, distinct market"). Any discounts on those deals did not affect Reeder's sales or profits.

The one sale Reeder lost to another Volvo dealer is legally insufficient to show competitive harm and cannot

support the entire § 2(a) award. Reeder's only evidence that it competed for a sale with a dealer that Volvo, according to the Eighth Circuit, gave a better discount is the Hiland Dairy sale. *See* App. 4a, 16a. This one sale alone—one sale out of over 5,000 claimed attempted sales by Reeder (C.A. 1159-61)—is a legally insufficient basis from which to infer competitive harm. *See Int'l Film Ctr., Inc. v. Graflex, Inc.*, 427 F.2d 334, 336 (3d Cir. 1970) (mere price differential in single isolated transaction did not constitute a RPA violation); *Am. Oil*, 325 F.2d at 106 (§ 2(a) claim requires "something more than an essentially temporary minimal impact on competition"). At all events, a § 2(a) claim based on this one sale (for which Reeder claimed lost profits of $30,000) cannot support the damages awarded (over $1.3 million before trebling). *See Rose Confections*, 816 F.2d at 395.

2. Under a proper application of the Robinson-Patman Act, the transactions at issue suggest no basis from which one could infer an injury to competition.

The Eighth Circuit's decision also does not identify indirect proof of competitive injury, *i.e.*, evidence from which the jury could *infer* competitive injury. There is no suggestion that Volvo, for a substantial period, gave better prices to other Volvo dealers that competed head-to-head with Reeder for customers. And Reeder's potential customers did not simply make covert purchases from other Volvo dealers. Trucks, unlike, *e.g.*, table salt, are not purchased casually from a corner store. Truck purchasers choose specific dealers with whom to select truck components. Only after components are chosen and the dealer contacts the manufacturer for a price concession, does the dealer propose a price. Thus, it would be incredible to suppose—and the decision identifies no supporting evidence—that any truck purchaser chose a dealer other than Reeder because it knew that the other Volvo dealer would have better prices.

In fact, as the Eighth Circuit acknowledged, the differences in price concessions (on different deals) were "small." App. 17a. Given the variety of factors that cause a manufacturer to set the price up or down on any transaction, that small differences in discounts between dealers that did not sell head to head could have no effect on competition. *See Rose Confections*, 816 F.2d at 385 (showing that "favored competitor received a *substantial* price reduction over a substantial period of time, . . . gives rise to a permissible inference of competitive injury" (emphasis added)). *Cf. Metro Ford*, 145 F.3d at 326 (RPA not violated where plaintiff truck dealer "was treated the same as all other Ford dealers with respect to [the price allowances] *for the same customer*" (emphasis added)).

3. In concluding that there was competitive injury, the Eighth Circuit erroneously relied on Petitioner's intent to use fewer dealers.

The Eighth Circuit's reliance on Volvo's supposed intent to reduce its dealer numbers as a basis for inferring a lessening of competition is also misplaced. Even accepting the evidence stretched to its limit in Reeder's favor, the most that can be inferred from Volvo's alleged intent to eliminate Reeder as its dealer is that Volvo could have given Reeder larger day-to-day discounts, but did not. As other courts of appeals have emphasized, a § 2(a) claim "must always focus on injury to *competition*." *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 395 (10th Cir. 1985).

Although a plan to eliminate Reeder as a dealer or not provide it with the best possible prices could have harmed Reeder, it could not have caused the necessary harm to intrabrand competition. *Id.* ("[n]either section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition" (emphasis in original)). By its own admission, Reeder competed only rarely with other Volvo dealers.

When one manufacturer's reseller does not compete with its others, the manufacturer's pricing decisions should not be inefficiently influenced by the possibility that the manufacturer has decided for its own business reasons not to provide the particular reseller with the best possible discounts. As in other antitrust areas, application of RPA principles should not be made to depend on inferences about a manufacturer's "intent" or "motive" in undertaking a particular marketing method. *Cf. NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138 (1998) (defendant's motive irrelevant to application of the per se rule). Where there is no demonstrated harm to competition, the RPA does not apply.

* * *

The RPA has long been criticized. As Assistant Attorney General R. Hewitt Pate, head of the Department of Justice's Antitrust Division, recently wrote, "Virtually every antitrust commentator who has examined this Act has concluded that it is inconsistent with effective competition policy and is anti-consumer." Letter from R. Hewitt Pate, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., to Deborah A. Garza, Chair, Antitrust Modernization Commission (Jan. 5, 2005), *at* http://www.usdoj.gov/atr/public/20707122.htm. *See also* Bork, *supra*, at 385 ("The fact is that no other antitrust statute has been subject to so steady a barrage of hostile commentary as the Robinson-Patman Act."). While it is beyond dispute that "anticompetitiveness and business inefficiency are built into [the RPA]," *id.*, the Eighth Circuit's decision, which one commentator has accurately described "as a tortuous journey through § 2(a)," William C. Holmes, ANTITRUST LAW HANDBOOK § 1:6 (Nov. 2004), threatens to increase substantially the anticompetitiveness and business inefficiencies in many markets, including those in which *amici* participate. Because these anticompetitive effects and inefficiencies result from the Eighth Circuit's interpretive error rather than from congressional intent, correction should come from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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